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No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PREDRAG STEVIC

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

ANN L. RITTER

420 Madison Avenue
Suite 1200
New York, New York 10017
(212) 371-4050

Attorney for Respondent

(i)

QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et seq., changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation.

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(1)

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IMMIGRATION AND NATURALIZATION SERVICE,

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals
(Petitioner's App.B, 4a-25a) is reported
at 678 F.2d 401. The order of the court
of appeals denying rehearing (Petitioner's

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App. A, 1a-3a) is not reported. The decisions of the Board of Immigration Appeals (Petitioner's App. D, 27a-31a; Petitioner's App. E, 32a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals (Petitioner's App. C, 26a) was entered on May 5, 1982, and a petition for rehearing was denied on July 29, 1982 (Petitioner's App. A, 1a-3a). On October 22, 1982, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including December 10, 1982. The jurisdiction of this Court was invoked by petitioner under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. (Supp.V) 1253(h) (1) provides:

The Attorney General shall not deport or return any alien *** to a country if the Attorney General

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determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

Predrag Stevic was born on June 11, 1950 in Gnjilane, Kosovo, Yugoslavia, a section of Yugoslavia that is 92% occupied by Albanians, who are trying to have this part of Yugoslavia secede from Yugoslavia and become part of Albania.

Mr. Stevic came to the United States on June 8, 1976, to visit his sister, Vidosava Stevic Lazarevic, who is now a United States citizen.

After Mr. Stevic arrived, he was introduced to a young lady, Mirjana Doichin, a United States citizen. Mirjana was born in Belgium, but her parents had been refugees from Yugoslavia and had been in Yugoslavian concentration camps. In

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1976-1977, Mirjana's father, Vladimir Doichin, a United States citizen, was in prison in Yugoslavia as an anti-Communist. Believing that his United States citizenship would protect him, he had gone back to Yugoslavia to visit, and had been imprisoned.

Because his permission to stay in the United States had expired and he wished to remain and to marry Mirjana, Mr. Stevic, with his sister Vidosava, went to the Immigration and Naturalization Service (hereinafter "INS") in Chicago to ask for an extension of time to stay. Upon his applying for an extension, he was instead served with an Order to Show Cause.

Mr. Stevic appeared at a deportation hearing at the INS offices in Chicago on December 16, 1976, with an attorney. Upon the advice of his attorney, he did

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not contest his deportability or ask for political asylum, but instead agreed to two months "voluntary departure". He was advised properly by his attorney that the proceedings would automatically be re-opened were he to marry Mirjana, a United States citizen, and she were to file an immediate relative petition for him.

On January 16, 1977, Mr. Stevic married Mirjana, who filed an immediate relative petition with the INS so that he would be eligible for adjustment of status to lawful permanent residence.

On April 5, 1977, the immediate relative petition was approved by INS.

On April 10, 1977, Mrs. Stevic was killed in an automobile accident.

The immediate relative petition was revoked by INS on June 13, 1977.

Mr. Stevic's attorney in Chicago requested that the petition be reinstated

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for humanitarian reasons under newly enacted 8 C.F.R. Section 205.1(a)(3). The District Director in Chicago denied the request, although this law had been passed to cover just these circumstances.

On August 24, 1977, Mr. Stevic's attorney made a motion to INS in Chicago to reopen deportation proceedings so that Mr. Stevic could apply for political asylum in the United States. He had become quite active as a member of several prominent anti-Communist organizations in Chicago.

The motion was denied because it did not demonstrate a "clear probability of persecution", the prior-1980 standard for political asylum.

His attorney appealed this decision to the Board of Immigration Appeals. The appeal was dismissed in January, 1980, because of failure to establish a prima

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facie case and sufficient evidence to indicate he would be "singled out for persecution". This decision was not appealed by Mr. Stevic's attorneys in Chicago to the Court of Appeals.

On July 17, 1981, Mr. Stevic was arrested in Chicago for deportation. While changing planes in New York City, he engaged in an altercation with his guards, and was placed in a detention center in New York City.

A Writ of Habeas Corpus was brought before the United States District Court, Southern District of New York, which addressed itself only to the abuse of discretion by INS in the denial of humanitarian relief under 8 C.F.R. Section 205.1(a)(3).

Simultaneously, a motion was made to the Board of Immigration Appeals to reopen and reconsider deportation under Section

243(h) of the Immigration and Nationality Act, submitting to the Board voluminous evidentiary material not available at Mr. Stevic's 1976 deportation hearing, to establish prima facie eligibility for political asylum. This motion was denied on September 3, 1981. The denial, in summary, held that Mr. Stevic had failed to prove a "clear probability of persecution" that will be directed at him (the standards of 243(h) prior to the Refugee Act of 1980) were he to be returned to Yugoslavia. (App. B, infra, 6a-7a).

Although Mr. Stevic had submitted affidavits from prominent members of the anti-Communist Yugoslavian community expressing the opinion that he would be imprisoned if he returned to Yugoslavia because of Yugoslavia's "hostile propaganda" laws, proof of his membership in the leading anti-Communist Yugoslavian

organizations in Chicago, reports from Amnesty International regarding Yugoslavia's "hostile propaganda" laws, and newspapers and magazine articles concerning the Albanian terroristic activities in Kosovo, which the Yugoslavian government is unable to control, the Board of Immigration Appeals felt that he had provided no "direct evidence" to link his activities in this country to the probability of his persecution in Yugoslavia. Under Yugoslavia's "hostile propaganda" laws, however, a person may be imprisoned for promulgating anti-Communist propaganda outside of Yugoslavia. Mr. Stević's father-in-law, a United States citizen, had been imprisoned under this law.

Mr. Stevic's Petition for Habeas Corpus was denied and in a consolidated proceeding, the District Court's denial was appealed and review was sought for

the Board of Immigration Appeals' denial of his motion to reopen deportation proceedings to give him an opportunity to apply for political asylum under Section 243(h) of the Immigration and Nationality Act.

Although the Court of Appeals upheld the District Court's denial of the Petition for Habeas Corpus, it reversed the Board of Immigration Appeals denial of Mr. Stevic's motion to reopen, holding that the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et. seq., had changed the standards to be used by the INS in adjudicating requests for withholding of deportation under Section 243 (h) of the Immigration and Nationality Act.

The court held that under Section 243(h), the non-discretionary standard was now a "well-founded fear of persecu-

tion", the language contained not only in Section 243(h), but also in the UN Protocol Relating to the Status of Refugees, to which the United States had adhered. The court found that the standard of a "well-founded fear of persecution" differed from the "clear probability" concept that an individual would be singled out for persecution, and that while the Board of Immigration Appeals' administrative practice had, prior to the passage of the Refugee Act of 1980, been to apply the "clear probability" test, the UN Convention and Protocol Relating to the Status of Refugees imposed an absolute obligation upon the United States to determine refugee status according to the "well-founded fear of persecution" standard.

A new hearing under the legal standard established by the UN Protocol was ordered.

REASONS FOR DENYING THE PETITION

The basic theme of the government's position is that to properly adjudicate refugee and asylum cases, using the standards adopted by the U.S. government in adhering to the UN Convention and Protocol Relating to the Status of Refugees and in revising Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), would impose too great an administrative burden.

The government does not contend that under the proper standard for adjudicating refugee and asylum cases, our shores would be flooded; the contention is wrongly that all 9,000 of the applications for asylum or withholding of deportation since the passage of the Refugee Act of 1980 could hinge upon whether the standard test applied is the "clear probability of persecution" or a "well-founded fear of

persecution".

In fact, most applications for asylum do not meet either test. For instance in Rejaie v. INS, 691 F.2d 139 (1982) (Petitioner's App. F, 37a-54a), Mr. Rejaie was an Iranian student who did not want to return to Iran to fight in a war against Iraq. Being required to join your country's armed forces does not meet the test of either a "clear probability of persecution" or a "well-founded fear of persecution". Mr. Rejaie submitted no affidavits or any other form of proof that he would be persecuted were he to be returned to Iran. Clearly he was not a pacifist, as his status in the United States came to the attention of the INS when he enrolled without INS authorization in the Valley Forge Military Academy. The conclusion of the 3rd Circuit Court of Appeals was that in his case, "the

'probability of persecution' is not 'clear'; the 'fear of persecution' is not 'well-founded'."

The 3rd Circuit Court of Appeals criticized the Stevic decision, stating that it had been advised by the government that the Board of Immigration Appeals viewed as interchangeable the terms "clear probability" and "well-founded fear" of persecution. It held that the change in the language of Section 243(h) was merely cosmetic surgery and that based upon the government's opinion, it found that there was no difference in the Board of Immigration Appeals' burden of proof formulation, whether labelled "clear probability" or "well-founded fear" of persecution.

In the case of Rejaie, both standards appear to have been lacking.

Mr. Stevic, in contrast, had a well-

founded fear of persecution based upon Yugoslavia's "hostile propaganda" laws and his proven anti-Communist activities, and the fact that a family member, also an anti-Communist active in the same organizations in the United States to which Mr. Stevic belonged, had been imprisoned in Yugoslavia. If this documented evidence is not enough to establish a prima facie case for a "clear probability" of persecution, then clearly there is a difference between the two standards, and this difference must be administratively recognized, as the "well-founded fear of persecution" happens to be the law.

It cannot be denied that there is a conflict in circuits. The 6th Circuit Court of Appeals in Reyes v. INS, 693 F.2d 597 (1982), (App. A, infra, 1a - 5a), siding with the 2nd Circuit Court of Ap-

peals Stevic decision, held that the "clear probability" test that an alien would specifically be subject to persecution for her political beliefs if she were to return to her own country was too stringent a standard to be applied to an alien seeking political asylum or withholding of deportation, and that since the alien had presented evidence and documented her claim for a "well-founded fear of persecution" under Section 243(h) of the Immigration and Nationality Act, her claim must be favorably considered.

Moreover, Mr. Stevic has now returned to Chicago, having been released from an Immigration jail in the 2nd Circuit, and is now residing in the 5th Circuit, which has rendered no decisions on the subject.

On the other hand, is this an issue that the Supreme Court should consider at this time? Guidelines for adjudicating

asylum claims under the UN Protocol are available. With judicial capacity in the adjudicating officers of the INS, proper interpretation of the guidelines under the "well-founded fear of persecution" standard of Section 243(h) should not be difficult.

Moreover, the 6th Circuit decision in Rejaie v. INS, 691 F.2d 139 (1982) (Petitioner's App. f, 37a-54a), demonstrates not that there is no difference between "clear probability of persecution" and "well-founded fear of persecution", but rather that in many cases, neither standard can be met with even the most liberal interpretation. How then would there be any tremendous administrative burden on the INS were the proper standard to be followed? In fact, the Board of Immigration Appeals will be aided by being able to finally have a

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clear standard by which to judge 243(h)
cases which is in accordance with federal
and international laws.

CONCLUSION

The petition for a writ of certiorari
should be denied.

Respectfully submitted.

ANN L. RITTER

Attorney

420 Madison Avenue
Suite 1200
New York, NY 10017
(212) 371-4050

February 1983

(1a)

No. 81-3157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIANE ROWENA ESTRELLA REYES,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

ON APPEAL from the
Immigration and Na-
turalization Service.

Decided and Filed November 18, 1982

Before: KEITH and JONES, Circuit Judges, and WEICK,
Senior Circuit Judge.

PER CURIAM. This is an appeal by petitioner, 22-year-old Liane Reyes, of a denial of her petition for asylum or the withholding of deportation under § 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1235(h). Reyes is a native and citizen of the Philippines. The Immigration Appeals Board affirmed the decision of the Immigration Judge, dismissed the appeal, and ordered the petitioner to depart the United States within thirty days of its decision. This appeal followed. We reverse.

Petitioner entered the United States on August 15, 1975 as a nonimmigrant exchange visitor under the Youth for Understanding exchange student program and pursuant to 8 U.S.C. § 1101(a)(15)(J). She was authorized, by a "J" visa, to remain in the United States until September 1, 1973, but remained here well beyond that date.

On November 14, 1979, the INS issued an Order to Show Cause and Notice of Hearing in which it was charged that Reyes was subject to deportation under § 241(a)(2) of the Immigration Act, 8 U.S.C. § 1251(a)(2). The hearing began on February 26, 1980, and was completed on April 22, 1980. While petitioner admitted that she was deportable, she asked for political asylum and withholding of deportation. She claimed that if she returned to the Philippines she would be persecuted for her political beliefs.

The petitioner testified at the hearing, and submitted documents relating to the request for asylum. Before the close of the hearing, the Immigration Judge granted Reyes fifteen days to submit any additional documents. On July 29, 1980, the Immigration Judge, in a written opinion, denied the application for asylum, and ordered that the petitioner be granted voluntary departure, in lieu of deportation, without expense to the government. That departure was to take place before August 29, 1980.

In support of her application for political asylum, Reyes testified that, when 13 or 14 years old, she participated in anti-Marcos¹ activities and that, in 1974 or 1975, she was taken from school, detained and questioned for two or three days. She further testified that the school officials wanted her to stop speaking out against the government, and that after she received that warning, her grades went down. She stated that she had been expelled from two schools, but gave no reason for the expulsions.

In addition, she admitted that she had been disciplined several times in school for disrupting classes and that her speeches were sometimes uninvited and in disruption of the class. Furthermore, she stated that she has family in the Philippines, none of whom have been persecuted. She also stated that the program upon which she came to the U.S. was, in part,

¹ President Ferdinand E. Marcos is the leader of the present martial law government in the Philippines.

probably funded by the government and that she was not persecuted, nor would she be, for her religion alone.

In addition to this testimony at trial, Reyes introduced a series of documents. First, she offered a series of articles from newspapers and magazines describing that the Philippines was lacking in human and civil rights. In addition, there were affidavits concerning trips of two persons to the Philippines and the general tenor of Philippine society. The only documents that dealt directly with Reyes were a letter by James Reuter, Director of Mass Media for the Catholic Church in the Philippines and statements by Robert Baylor. Reuter's letter described particular incidents of persecution and violence against others, and advised she should not return to the Philippines. Baylor's letter was also quite descriptive.

The Immigration Judge denied the petitioner's request for asylum, stating that though the evidence introduced in the record and at the hearing shows that "the present Philippine government fails to provide the freedoms and other constitutional guarantees to be found in the United States," the true test in asylum cases is whether the petitioner can "establish that she will be singled out for persecution on the basis of her race, religion, political opinion, nationality (ethnicity) or membership in social organizations."

On review we must determine whether the Board applied the correct legal standard below and whether the Board's decision is supported by substantial evidence in the record as a whole.

We hold the Board correctly stated that the burden on the person seeking asylum under § 243(h) is to show that, if deported, he or she would be singled out for persecution based on his race, religion, nationality, membership in a particular social group, or political opinions. *McMullen v. Immigration and Naturalization Service*, 658 F.2d 1312 (9th Cir. 1981). Yet, it also stated that to meet that burden, "the alien

must demonstrate a clear probability that he will be persecuted if returned to his country. *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968)."

It is important to note that there were substantial changes in the Immigration Act since *Cheng Kai* had been decided. In fact, the Second Circuit has suggested that the "clear probability" test is inconsistent with the tenor and spirit, if not the language, of the new provisions. In *Steric v. INS*, 678 F.2d 401 (2d Cir. 1982), the Second Circuit wrote:

Both the text and history of that document [the new Act] strongly suggest that asylum may be granted, and under Section 243(h), deportation must be withheld, upon a showing *far short of a "clear probability"* that the individual will be singled out for persecution. *Id.* at 409 (emphasis added).

Since the Board applied the more stringent clear-probability test, the holding cannot stand. It is admitted that there is some evidence that Reyes may be subject to persecution. All the Board held was that she had not shown, by a clear probability, that she would specifically be subject to it. Since something less than that showing is now required, we find that the Board erred.

In considering the petitioner's evidence for sufficiency, we must analyze the two sub-issues involved. They are, first, the kind of evidence needed, and second, whether it was sufficient to support the petitioner's claim.

The INS cites two Ninth Circuit cases for the proposition that some objective evidence concerning the likelihood of persecution is needed. *Moghanjian v. Department of Justice*, 577 F.2d 141 (9th Cir. 1978) and *Pereira v. INS*, 551 F.2d 1149 (9th Cir. 1977). These cases do support the view that one must have more than one's own testimony to support a claim under § 243(h). Yet, it is not clear what kind of objective evidence is needed. Obviously, we do not wish to force the INS to accept potentially self-serving statements

as true in granting asylum under § 243(h). On the other hand, it is difficult to see what more than what was offered here we would require, short of proof of actual persecution after the fact. Here, Reyes offered affidavits from relatives, general newspaper and documentary reports concerning the general conditions in the Philippines and a letter from the Director of Mass Media of the Philippine Catholic Church. Finally, there is her own testimony.

We hold that under the circumstances here, the testimony of the individual *and* documents offered indicating a repressive environment and suggesting that petitioner *not* return to the Philippines is sufficient to bring her risk within the tenor and spirit of the new provisions of the Act. *Stevic v. INS.*, *supra*; *McMullen*, *supra*.

We find no evidence in the record which detracts from the force of the evidence offered by and on petitioner's behalf. Thus, in considering the record as a whole, we not only find that there is not substantial support in the record for the conclusions of the Board, but that overwhelming evidence supports petitioner's claim.

Accordingly, the order of the Board is REVERSED and the case REMANDED to the Board with directions to grant the petition.

Public Law 96-212
96th Congress

An Act

Mar. 17, 1980

[S. 643]

To amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes.

Refugee Act of
1980.

8 USC 1101 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Refugee Act of 1980".

TITLE I—PURPOSE

8 USC 1521 note.

SEC. 101. (a) The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.

(b) The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

TITLE II—ADMISSION OF REFUGEES

SEC. 201. (a) Section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)) is amended by adding after paragraph (41) the following new paragraph:

"Refugee."

"(42) The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, (or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on

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account of race, religion, nationality, membership in a particular social group, or political opinion.”

(b) Chapter 1 of title II of such Act is amended by adding after section 206 (8 U.S.C. 1156) the following new sections:

**“ANNUAL ADMISSION OF REFUGEES AND ADMISSION OF EMERGENCY
SITUATION REFUGEES**

“SEC. 207. (a)(1) Except as provided in subsection (b), the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e)), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

Entry,
numerical
limitations.
8 USC 1157.

“(2) Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

“(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

“(b) If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

Emergency
conditions.

“(c)(1) Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act.

Attorney
General's
authority.

“(2) A spouse or child (as defined in section 101(b)(1) (A), (B), (C), (D), or (E)) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 101(a)(42), be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

Spouse or child,
admission
status.
8 USC 1101.
Ante. p. 102.

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